TESTIMONY OF JEFFREY T. RENZ
SB 236
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In the last session of the Legislature, SB 306, the bill to abolish the death penalty, came very close to passing. A similar bill, SB 236, has been introduced to the 61st Legislature. I write to offer a comprehensive summary of the history of capital punishment, the moral and ethical questions raised by capital punishment, and the current debate about its effectiveness. I apologize for the length of this memo. It is necessarily long because it reflects two years of study and thought and writing.

I begin with what I now consider to be the most significant argument in opposition to execution. Then, because this view leads to the moral and ethical justifications for capital punishment, I review the history of capital punishment in Christendom, which is the source of those justifications. In the third section I review and discuss the moral and ethical justifications for capital punishment: eye-for-eye, retribution, general deterrence, and specific deterrence or self-defense. Finally I will address a key objection–the execution of innocent defendants.

I. The Primary Opposition View: The Death Penalty Denies an Offender the Opportunity for Repentance and Redemption

We all have our idea of repentance. By repentance I mean the criminal's contrition and absolution. By redemption, I mean those of the criminal's acts and obligations that follow repentance that are necessary to expiate–to provide satisfaction to God for–one's sin.[1]

The Gospels are filled with messages of repentance and redemption. We are told, for example, that "there will be more joy in heaven over one sinner who repents than over ninety-nine righteous persons who need no

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[1] *"By this a man is entirely freed from the guilt of punishment when he pays the penalty which is owed; further the weakness of the natural good is cured when a man abstains from bad things and accustoms himself to good ones: by subjecting his spirit to God in prayer, or by taming his flesh by fasting to make it subject to the spirit, and in external things by uniting himself by giving alms to the neighbors from whom his fault had separated him." Thomas Aquinas, Summa Contra Gentiles, Book Four, Ch. 72:14.*

repentance."[2] The death penalty, however, is anti-redemptive. Execution ends all possibility for the murderer's repentance and for his redemption.

It is true that the murderer has an opportunity to repent prior to his execution. Nevertheless the death penalty remains anti-redemptive.[3] When the judge signs the death warrant on our behalf, we impose a deadline for the killer's repentance and redemption. So we will execute murderers before they achieve that redemption that they might have realized at a later time.

There is no time limit on repentance and redemption. We are told that we are to forgive, not seven but seventy-seven times.[4] Peter explains that God does not wish "that any should perish but that all should come to repentance."[5] He also makes clear that the "deadline" for repentance is not to be set by man, but by God, "who will come like a thief."

Think of it in this way. The human being in the womb has potential but has no history. Because he has no history, we consider him innocent. Because he has potential, we count his humanness as inherently valuable. His humanness, his potential to do good, and his human dignity, is that which will be shown in the future.

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[2]Luke 15:7-10 (all references are to the New American Bible); see Matt. 21:31, where Jesus notes that "the tax collectors and prostitutes" [who have repented] will enter heaven before the Pharisees, who have not repented. For an Old Testament example, see Ezekial 33:1-20.

[3]The Catholic Church of the 15th Century was so conscious of this fact that it established a religious order, the Archconfraternity of St. John the Beheaded. The members of this order were to stay with the condemned in their last hours to aid them in repentance and in making their peace with God and with the Church before they were executed. The brothers of St. John the Beheaded continued their work for four centuries.

[4]Matt. 18:21-22.

[5]2 Peter 3:9-10.

The human being on death row has potential but has history. Because of his history, we count him guilty. But he nevertheless retains his human potential. Like the unborn child, his humanness is inherently valuable and each day offers him the opportunity to do good. When we kill him, we extinguish that potential (in the same way that he extinguished his victim's.) When we kill him, we do not, however, extinguish his history. When we extinguish his humanness, his human dignity, and his human potential to do good, we do wrong. When we fail to extinguish his history, we do no good.

Therefore, I ask: If the Lord never gives up on a sinner, what is our moral authority to frustrate His plan, to take the criminal's life, to end the offender's opportunity for repentance and redemption, to put an end to human potential?

The answer given by supporters of execution is the result of a deal made with the Devil during the early years of Christianity.

II. How We Got Here: The History of Capital Punishment in Christendom.

The attitude of Christians (including the early Church) towards capital punishment over 2,000 years may be divided into four eras: (1) the period of non-engagement; (2) the period of accommodation; (3) the period of justification; and (4) the period of opposition.

30 A.D. to 337 A.D. The Period of Non-Engagement.

During the first four centuries of the Christian Church, Christians adhered to a code of non-violence. They abjured all killing of human beings, including killing by a soldier or in self defense. Early Christians did not serve in the army, did not act as executioners, did not serve as magistrates who could impose death, and did not hold positions that exercised similar powers of life and death.[6]

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[6]*Megivern, James J., The Death Penalty, An Historical and Theological Survey 40-42 (Paulist Press 1997).*

During this first period of Christianity, Christians did not need to be concerned about the death penalty, because the death penalty was outside the Body of Christ (that is, outside the Church itself.) As the second period approached, the Church was faced with a choice: the secular could join the Body of Christ or the Body of Christ could join the secular. The Church, acting in a fallible human way, joined the secular. It was after this point that the Church fathers began to accommodate the imposition of the death penalty.[7]

337 A.D. to 1100 A.D. The Period of Accommodation.

The second period began when Roman Emperor Constantine converted to Christianity in 337. At this point several factors came into play. The first was the pagan Roman tradition that recognized the Emperor either as divine or as the representative of the divine. Religion and state had been unified in the Roman Empire in the body of the Emperor. Constantine's conversion did not change this. With his conversion, Christianity became the state religion.

Once Christianity became the official state religion, church leaders were confronted with a dilemma. On one hand, Roman imperial approval offered the opportunity to bring the Gospel to millions and to exercise power and influence in state affairs. On the other hand, Christians would have to abandon their centuries-old rule of non-engagement in the state's machinery of death.

> *"Once Christianity had become the state religion, the imperial values articulated in Roman law tended to overwhelm gospel values. 'Citizenship and membership in the state religion were inseparable. The emperor deemed it his duty as the repository of religious authority to regulate the church, and this seemed entirely natural to contemporaries.' [Russell, Jeffrey B., Dissent and Order in the Middle Ages 10 (Twayne Publishers 1992).] As a result, the legacy of Constantinian-Theodosian Christianity to subsequent ages was highly*

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[7]*Christian Brugger, Capital Punishment and the Roman Catholic Moral Tradition 74-84 (Notre Dame 2003).*

ambiguous on the ethics of killing, whether in the case of war or capital punishment. Less and less attention was paid to that most troublesome of the teachings of Christ: the prohibition of taking revenge." [8]

It mattered little which religion was the state religion. The Roman Emperor remained both head of state and the chief magistrate of the Church. The Emperor convened synods of bishops to settle doctrinal disputes. The Emperor outlawed and punished heretics and gave tacit approval to violent purges within the Church.[9]

Christian Brugger concludes:

"It is not surprising that when circumstances after AD 313 [Constantine] made it virtually impossible for Christians to avoid involvement in civil administration, the Church acquiesced to the idea that Christians could legitimately share in duties once reserved to pagans. [That is, work as judges and soldiers.] At the same time, the faith that Christian magistrates confessed made forceful claims, as Augustine makes clear, on the

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[8]*Megivern at 50.*

[9]*During the reign of the Christian Emperor Theodosius I, a Christian mob incited by Theophilus, the Bishop of Alexandria, attacked the Serapeum and burned its library of several hundred thousand volumes. John William Draper, History of the Conflict Between Religion and Science 54 (D. Appleton & Co. 1881); Christopher Haas, Alexandria in Late Antiquity: Topography and Social Conflict 160-163 (Johns Hopkins University Press 1997). Under Theodosius II, Cyril, Theophilus's successor, commissioned a mob of monks, led by his assistant that attacked and murdered Hypatia, for giving lectures on philosophy and mathematics. Susan Wessel, Cyril of Alexandria and the Nestorian Controversy, 46-57 (Oxford University Press 2004); Haas at 307-309, but see id. at 313-316 (arguing that little evidence links Cyril to her death).*

practical carrying out of those duties." [10]

Through a gradual process of accretion, rationalization, and accommodation, Christian leaders found ways to justify Christian participation as soldiers, executioners, and magistrates in the state's machinery of death. Nevertheless the Church clung to one principle. Killing–even justifiable killing, killing in a just war, and killing under the direction of the sovereign–remained a sin. After the Battle of Hastings, for example, William the Conqueror and his knights performed penance for killing and injuring King Alfred's soldiers, even though the Church had recognized the conflict as a "just war."[11] *Nevertheless, throughout this period, although the laity might shed blood, the clergy remained barred from participation in homicide or bloodshed of any kind. This changed as Christianity entered its third phase, church-sanctioned homicide.*

1100 A.D. to 1994 A.D.: Justification.

During the third period, the view that lawful homicide was sinful became the view that lawful homicide was required by God. Some homicides were not only lawful, but led to grace. This came as a result of several circumstances: the Crusades, the advent of warrior clerics and warrior Popes, and the sovereign's and the churches' responses to heresy and the Protestant Reformation.

The calls for Crusade established a Christian duty to make war on infidels and regain the Holy Land. Lawful homicide became much more than sin-free: killing Muslims earned God's grace.

After the establishment of kingdoms and principalities in Europe following the decline and fall of the Roman Empire, the hierarchy of the Church was populated with the second and third sons of nobility. They had been trained in arms and state-craft. Warrior popes and the various orders of clergy-knights were natural outgrowths of this circumstance. Powerful

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[10]*Brugger, Capital Punishment and the Roman Catholic Moral Tradition at 95.*

[11]*Megivern at 65.*

warrior clergy eventually established Papal states that engaged in warfare with their neighbors under the Pope's banner and occasionally under the Pope's active command in battle. At the highest levels of Christian leadership shedding of infidel blood and, soon, of Christian blood, became an acceptable norm.

The relaxation of the ban against the clergy's participation in bloodshed and the perception of some killing as God's work laid the foundation for the hunting and execution of Christian heretics. One of the more remarkable suppressions was that of the Cathar heretics during the Albigensian crusade of the 13th Century. The Cathars were a Christian sect that believed that the material world had been created by an evil god. They occupied all strata of society in southern France. In 1208, Pope Innocent III called for a crusade to eradicate the Cathars and appointed the commanders of the Catholic army. In 1209, the crusaders entered Béziers and executed 20,000 of its citizens. When asked how they should distinguish Catholics in the town from the Cathars, the Papal legate reportedly said, "Kill them all; God will recognize his own."

The war against heretics reached its bloody peak during the time of St. Thomas Aquinas. Aquinas was the son of an Italian noble. His German mother was related to the Holy Roman imperial family. All but one of his brothers had entered the profession of arms. Aquinas, against this backdrop, penned justifications for capital punishment that form the arguments for capital punishment today.

Under Aquinas's teaching, the execution of heretics justified the execution of religious dissenters and, by the Fifteenth and Sixteenth Centuries, justified Protestant massacres of Catholics and Catholic massacres of Protestants. Instead of condemning such violence (against the Huguenots in the St. Bartholomew's Day massacres of 1572), Pope Gregory XIII held a mass of thanksgiving. In Seventeenth Century England, Protestant turned against Protestant, and dissenters from the official Protestant church, Puritans and Baptists among them, were soon persecuted, tortured, and executed. Catholic philosopher Hans Kung later summed up the period:

"All who were worthy of damnation, destined for hell,

were opposed by the sword, with torture, and continually with fire, so that by the death of the body here below the soul might perhaps be saved for the hereafter. Forced conversions, burning of heretics, Jewish pogroms, crusades, witch hunts in the name of a religion of love, cost millions of lives (in Seville alone in the course of forty years four thousand persons were burned by the Inquisition)."[12]

It is most important to remember that these church-sanctioned executions were also state-sanctioned executions–a unity that had been realized centuries earlier. Heretics, whether they were the Cathars of Languedoc or English Protestants, were anathema to the Church as well as criminals and threats to the social order of the state. The justification for the execution of criminal heretics, religious dissenters, and Protestants, set out in Thomas Aquinas's writing, justified the execution of those who committed other crimes against the sovereign. That justification survives today in the form of Montana's death penalty.

1995 A.D. - Now: Opposition.

The final phase developed at the end of the 20th century. It is reflected in the 1997 Catechism:

"Today, . . . as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm--without definitively taking away from him the possibility of redeeming himself--the cases in which the execution of the offender is an absolute necessity 'are . . . practically non-existent.'"[13]

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[12]*Hans Küng, Eternal Life? Life after Death as a Medical, Philosophical, and Theological Problem 136 (Garden City, N.Y.; Doubleday, 1984).*

[13]*Catechism of the Catholic Church, § 2297 (2d Ed. 1997); Pope John Paul II emphasized this: "The Death penalty is only appropriate in cases of absolute necessity, in other words, when it could not be possible otherwise to defend society. Today, however, as a result of steady*

Modern Catholic doctrine distinguishes between acts intended to cause the death of a human being and acts that may result in the death of a human being. Therefore, acting in self-defense is permissible and engaging in battle is permissible, so long as the intent is to disable the attacker or the enemy, even if death is the result.

Capital murder is different. When one murders death is the object; death is intended. Captial punishment is also different. When we execute a criminal, death is the object; death is intended.[14]

Over two millennia, then, Christians have come full circle from a position of (1) conscientious disengagement from state-sponsored killing, (2) to accommodation, (3) to justification and duty, (4) to opposition to state-sponsored killing. Today the Catholic Church and several Protestant denominations condemn capital punishment. They have moved closer to the Christians of the first three centuries, who were in turn closest in time to Christ's teaching.

Against this background, several ethical arguments for the employment of death as a punishment persist. Many of these, as we shall see, are artifacts of our primitive human past.

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improvement in the organization of the penal system, such cases are rare, if not practically non-existent." Pope John Paul II, Evangelium Vitae (1995).

[14]Montana's laws on justifiable use of force (self-defense), like those of all other states, follow an approach that parallels the views of the Catholic Church. Montana law recognizes that I may employ lethal force in self-defense when another attempts to cause my death. But once I have disabled my attacker, or taken away his means or ability to kill me, I may no longer employ lethal force. If I kill my attacker after I have disabled him, I murder him. State v. Freeman, 183 Mont. 334, 599 P.2d 368 (1979).

III. Philosophical, Ethical, and Moral Arguments for and Against Capital Punishment

When we were faced with our innate hesitation to kill another human being and with Old and New Testament injunctions against killing, human beings (in the West, in any event) sought legal, moral, and ethical justifications for the killing of another human being, especially when that person was unarmed, imprisoned, and at the mercy of the sovereign. These arguments have included lex talionis, retribution, general deterrence, and specific deterrence (or self-defense).

Lex Talionis: "An eye for an eye; a tooth for a tooth; a life for a life."

Our most commonly recognized justification for the death penalty is lex talionis or "eye-for-an-eye," is not a justification at all. Lex talionis appears in Exodus 21:23-25; Leviticus 24:17-21; and Deuteronomy 19:21. These passages are often viewed as commands. If, however, we look to their original understanding by considering the circumstances of the times, we discover that lex talionis is intended to limit the measure of retaliation that may undertaken.[15] We see this in every primitive society.

During the course of their history human societies evolve from family-based to clan-based to tribe-based to city/region-based to sovereign-based to national-based loyalties and organizations. Primitive societies that were (and are) organized along clan or tribal lines were brutal and violent.[16] Killing or wounding of one by another who was not a member of the immediate family triggered duties of vengeance among the deceased's kin. I want to point out that this is a universal truth. We find it in early England in the tales of Beowulf,[17] among Scandinavian clans in the Icelandic

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[15]*Cardinal Sean O'Malley, Gospel of Life v. The Death Penalty, Pastoral Letter on Capital Punishment (February 25, 1999).*

[16]*These societies persist today in Africa, New Guinea, Afghanistan, and Western Pakistan.*

[17]*R.W. Chambers, Beowulf, An Introduction to the Study of the Poem With a Discussion of the Stories of Offa and Finn 276-283 (3d Ed.*

Sagas,[18] among the head-hunting tribes of Northern Luzon,[19] among the Plains Indians, in Balkan tribal societies, and among the tribes of Melanesia.[20]

It was this way because in primitive society, vengeance is necessary if one group is not to be subject to the power of another. Vengeance was not necessarily exercised against the individual who committed the harm. Because vengeance was necessary to free one kinship group from the power of another, vengeance could be and was exercised against any member of the offender's clan.

In primitive society vengeance also means overkill. A wound may be avenged by death. A death in turn is avenged by two deaths. This meant that either side always felt that retaliation was justified. Neither side was satisfied. Inter-clan relations were defined by feuds and vendettas.

Cambridge Press 1959).

[18]Lars Lonnroth, Njal's Saga: A Critical Introduction 175-178 (University of California 1976); Njal's Saga, chs. 100-105 (Magnus Magnusson and Hermann Palsson Tranls., Penguin Group, London 1960) (Njal's Saga); The Laxdale Saga 171-178 (Muriel Press Transl., Peter Foote, Ed., J.M. Dent & Sons, London, 1964); Chambers, Beowulf, at 278.

[19]R.F. Barton, The Kalingas: Their Institutions and Custom Law (University of Chicago 1947) (hereinafter Kalingas); R. F. Barton, Ifugao Law, 15 Univ. of Cal. Pub. in Archaeology and Ethnography 1 (1919); Rosaldo, Renato, Ilongot Headhunting (1883-1974): A Study in Society and History (Stanford 1980); A.L. Kroeber, Peoples of the Philippines (American Museum of Natural History, New York, 1928); Felix Keesing and Marie Keesing, Taming Philippine Headhunters (Stanford University Press 1934).

[20]Hans Kelsen, Society and Nature: A Sociological Inquiry 60 (Univ. of Chi. 1943) (citing Maurice Leenhardt, Notes d'ethnologie Neo-Caledonienne VIII Travaux et Mémoires de l'Institute d'Ethnologie 46 (Université de Paris 1930), and C.G. Seligmann, The Melanisians of British New Guinea, 569 ff. (1910).)

An ongoing feud meant that a group of tribes who were otherwise unified by religion, race, or language would be weakened and vulnerable to others. As early societies began to identify their commonalities as ethnic groups, religious groups, or language groups, lex talionis took hold. Again, this is a universal truth. The Cheyenne Indians, for example, mark their existence from the time that their culture-hero, Sweet Medicine, brought their new laws to them. Under the old law, assaults and killings were avenged by killings. Under the new law, no Cheyenne could kill another Cheyenne. If one Cheyenne did murder another, he should be banished, not killed. (Indeed, the Cheyenne could be seen as Montana's first pro-life group. Homicide, infanticide, and feticide (abortion) were all prohibited.) Northern Luzon headhunters and Albanian clans began to substitute ritual wounding for the ritual taking of heads and all groups began the practice of payment of wergeld (man-price) to prevent escalating violence.

If the Hebrew tribes were to survive as a religious people, they could not continue to decimate each other in inter-clan and inter-tribal feuding. Considered in this context, we see that the early injunctions in Exodus, Leviticus, and Numbers are not commands to avenge but limits on the measure of vengeance. Old Testament scholar S. David Sperling[21] adds that Old Testament injunctions must also be viewed against the prevailing codes of the time. These codes, like the tribal practices of all primitive societies, permitted vengeance against a family member of the offender and permitted lesser punishments against those of higher class. "In contrast, Biblical law similarly limits the penalty but in regards to the offender; thus, only the offender is killed and there is no difference in punishment based on the victim's membership in a particular class. Thus, while Biblical law definitively prescribes the death penalty, that law must be compared with a system in which the class of the person killed was significant and in which your children could be executed because of something you did."[22] By setting a limit through law or custom on the

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[21]*Rabbi S. David Sperling, Ph.D., Professor of Bible at Hebrew Union College - Jewish Institute of Religion.*

[22]*Symposium: the Death Penalty, Religion, & the Law: Is Our Legal System's Implementation of Capital Punishment Consistent with Judaism or Christianity?, 4 Rutgers J. of Law and Religion 1 (2002).*

amount of retaliation, the greater society could reduce the harm of the feud.

There is a second aspect to the duty of vengeance in primitive societies. When violence prevailed, it was difficult to distinguish accidental killing from murder and justifiable killing from murder. Therefore, nearly every homicide triggered a duty of vengeance. This, again is a universal truth. Among the Ifugao of Northern Luzon, for example, only the most clearly accidental killing does not trigger a duty of vengeance.[23] The best and most common example of defined homicide is "secret" killing. It would be logical that the discovery of a dead body together with evidence that the deceased had died from violence would give rise to a duty of vengeance. Likewise the lack of an explainable cause of death gave rise to a duty of vengeance because the only remaining explanations for such a death were poison or witchcraft. Such killings are undiscovered, or secret, killings. These again, are recognized in nearly all societies.[24]

The second way that societies tamped down inter-clan killing and feud was by defining and limiting the kinds of homicides that were eligible for vengeance. Passages in Exodus, Deuteronomy, and Numbers limit and define those homicides for which a kinsman may seek blood vengeance.

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[23]*Ifugao Law, 15 University of California Publications in American Archaeology and Ethnology 1, 78-79, ¶ 102 (1919). Barton offers the example of the hunters who, encountering a boar, accidentally pierce one of their fellows with the butt end of the spear as the hunter attempts to stab the boar. See also The Kalingas at 199.*

[24]*Norman England called secret killing as morð (murth); the Normans called it mordre. Secret murder could not be redressed by other than the death or mutilation of the offender. II Pollack & Maitland, The History of English Law 483 (2d Ed. 1899) (Legal Classics Reprint 1982). In similar fashion, Northern Luzon tribes considered blood vengeance to be the only permissible response to unexplainable death, that is, death that could only have been caused by sorcery. A.L. Kroeber, Peoples of the Philippines 157-158 (American Museum of Natural History, New York, 1928).*

We frequently hear supporters of capital punishment refer to these Old Testament passages as Biblical authority for the death penalty. We have never heard those supporters call for the adoption of the checks against the death penalty found in the Old Testament. They never seem to adopt the rule that one who makes a false accusation shall suffer the punishment that would have been the result.[25] *They never argue for the rule that at least two eyewitnesses are necessary for a conviction that is punishable by death.*[26]

Thus, Montana's death penalty is not the Old Testament death penalty. As one scholar points out, at the time of the Temple in Israel,

> *"Another protection enjoyed by the defendant was a requirement that the evidence presented had to be direct evidence; there had to be two witnesses to the crime and circumstantial evidence was not permitted. That makes one start to think that fingerprint and DNA evidence, had it existed at the time, would not have been permitted. Instead, the two witnesses had to be present before the crime was committed; they had to see the potential murderer with a weapon in hand; they had to ask the potential murderer whether he was aware that he would be eligible for the death penalty if he were to commit the crime; the potential murderer had to respond that he was aware that he could be subjected to the death penalty; the witnesses then had to see the murderer commit the act. Meeting these requirements did not necessarily guarantee the murderer would be punished by death, as the witnesses' testimony would be found invalid if there was any reason to suggest they might be biased. Moreover, the testimony was invalid if the witnesses would receive any benefit from giving their testimony. So, unlike our system, there were no 'deals.' The witnesses had to be warned at the time of testimony of the serious penalties for perjury, and they had to acknowledge that*

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[25]*Deuteronomy 19:16-21.*

[26]*Deuteronomy 17:6.*

they are aware of these risks."[27]

If one wants to justify Montana's death penalty by relying on lex talionis, then they must understand the full implications of their argument. Those are, first, lex talionis is not a command. Second, lex talionis is a rule of a primitive, not a modern society. Third, Old Testament lex talionis carries very strict limitations. Two eyewitnesses are required. Circumstantial evidence is not sufficient. The witness, the policeman, and the prosecutor would be subject to the very penalties that they seek, if their accusation is somehow false.

In primitive societies vengeance justified capital punishment. In modern society, however, a key justification for the death penalty is retribution.

Retribution.

First we should define and understand retribution. Retribution is neither vengeance nor revenge. It is generally defined as punishment that is necessary to redress the disorder, the imbalance, or the dis-justice, caused by an offense. We also consider retribution to be a rule of just deserts. Put in its most basic terms, retribution holds that (a) wrongdoing merits punishment; (b) a person who does wrong should suffer in proportion to his wrongdoing; (c) punishment follows from the wrongdoer's guilt, which means that only the guilty may be punished; (d) a state of affairs in which a criminal is punished is morally better than one in which he is not; and (e) the foregoing are true without regard to any other positive or negative aspect or consequence or derivative result of punishment.[28]

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[27]*Remarks of Rabbi Julie Schonfeld, in Symposium: the Death Penalty, Religion, & the Law: Is Our Legal System's Implementation of Capital Punishment Consistent with Judaism or Christianity? 4 Rutgers J. L. & Religion 1, ¶ 150 (2002).*

[28]*The current understanding of retribution is derived from Emmanuel Kant, The Metaphysics of Morals [333] 142 (Mary McGregor, Trans., Cambridge University Press 1991). Kant is not alone in his thinking. In the Senate Judiciary Committee's Executive Session debate on SB 306 in the*

Retribution has two components. The first is the earning of punishment. The criminal is punished because he deserves it–because he is guilty of an offense.

The second component is the measure of the punishment. The retributive measure of punishment depends on the crime and its circumstances. The more severe the circumstances, the greater the measure of punishment.

Retribution operates at both the policy-making level and the adjudication level. The legislature determines policy when it sets out the ranges of punishment necessary to establish a moral state of affairs. At the adjudicative level, the judge or the jury will determine the proper measure of punishment (within the limits set by the legislature) due a guilty offender in light of the circumstances of his or her particular offense.

The retributive measure of punishment does not depend on the offender's circumstances. The offender's circumstances affect the measure of mercy, so the second way to think about measure of punishment is to think about upon whom the punishment actually operates. Once we settle upon the proper punishment for a particular offense and its circumstances, we then must look to the person who committed the crime. In a retributive system, the punishment for the particular offense is decided and any reduction of that punishment is an act of mercy. It is through mercy that we take into account the sad and sometimes unusual circumstances of the defendant. We look more mercifully on one who steals to eat than we do on one who steals for fun.

Does retribution demand the death penalty for homicide? Some (Kant, for example) say "Yes, of course it does." But it becomes far more complicated.

2007 session, Sen. Dan McGee, whether he realized it or not, restated Kant's philosophy: "I think the people who do that, however contrite, later, I think society has a right to say, 'No!' And not say, 'We're just going to warehouse you for the rest of your life.' No. 'You stop breathing. That's it. You're done. You had your chance.' You had your chance and society is saying, 'No.'"

For now, let us assume that the only proper retributive response for homicide is the death of the killer. We must then consider the question of mercy. The consideration of mercy in death penalty cases is required by the Cruel and Unusual Punishment clause of the Eighth Amendment.[29] Mercy is, after all, the element that distinguishes justice from tyranny. Judgment without mercy is iniquity. Needless to say, the circumstances of every defendant convicted of murder are different. Some deserve more mercy; some deserve less; some deserve none.

As soon as we have a system that may treat different defendants differently by according some mercy and denying it to others, a retributive punishment that is neutral on its face becomes non-neutral in application. What I am saying specifically is that, if the death penalty is given disproportionately to one group as opposed to another for crimes of similar circumstances, then it loses all retributive value. If death is imposed on members of one group but not on members of another, capital punishment is no longer a measure or definition of what is considered abhorrent by society. It is instead a measure of an act considered abhorrent by society when that act is committed by someone who is a stranger–a member of an outsider group. When that happens the death penalty is no longer justified by retribution.

In order to cure the loss of retributive value caused by the practice of extending mercy, society must ensure that the application of punishment is consistent across groups. This is done in one of two ways, decreasing the punishment for the outsider to bring it in line with that suffered by the members of the dominant group, or increasing the punishment for the member of the dominant group to bring it in line with that suffered by a stranger. In short, if you want to justify punishment as retribution, you must punish your relatives, friends, and neighbors with the same severity that you punish strangers. Therefore it does not matter if the law operates consciously on a person as a result of individualized racial, ethnic, or national animus, which is the current conservative interpretation of the 14th

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[29]*Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).*

Amendment.[30] *If a system of punishment operates so as to generally punish outsiders more severely than others for the same crime, it loses its retributive character.*

And that is what has happened in Montana. Since the death penalty was restored in 1976, Montana has sentenced thirteen men to death. None of them was a member of the community in which they were tried, convicted, and sentenced to death. Two were Northern Cheyenne. (Vern and Lester Killsontop.) One was Black. (Dewey Coleman.) Four were already confined to prison. (Douglas Turner, William Gollehon, Daniel Johnson, and Rodney Sattler.) Three were drifters. (Ron Smith, Terry Langford, and David Keith.) Two had recently moved to Montana from another state. (Duncan MacKenzie and David Dawson.) The last, Bernard Fitzpatrick, had been released on parole a few weeks before his offense.

Evidence that the death penalty is imposed disproportionately on Black defendants who murder white victims, McCleskey, 481 U.S. at 286-287, is only part of the story. Race is merely a sub-category of the category of outsiders. Like American Indians in Montana, Black defendants are outsiders because they are strangers because of their racial origins. Others are outsiders for reasons other than race because they too are strangers by reason of their origins.

Nevertheless, the question here is not one of racial discrimination. The question is, if we punish people more severely because of characteristics not related to their crime, are we engaging in retribution? We are not, of course, and under such circumstances retribution cannot justify the death penalty.

U.S. Supreme Court Justice Antonin Scalia has recognized this situation in its general sense. That is, he has pointed out that there is a conflict between the Supreme Court cases that require states to strictly define death-eligible crimes and those cases that require broad discretion

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[30]*McCleskey v. Kemp, 481 U.S. 279, 286-287 (1987) (recognizing the evidence that showed racial disparities in sentencing but requiring a defendant to demonstrate that race was a factor in his sentence.)*

when it comes to granting mercy.[31] Justice Scalia's observation is correct. The Montana capital punishment system of aggravating factors (that limit the discretion to impose the death penalty)[32] and mitigating factors (that expand the discretion to grant mercy)[33] is our attempt to scientifically define sentencing in death penalty cases. When you scientifically define one side (aggravating factors) of the equation but open up the mitigation side, you invite the same lack of discretion that was found to be unconstitutional in Furman v. Georgia in 1972.

From a defense lawyer's point of view, anything, including broad discretion to grant mercy, that may save the client's life is a good thing. From a broader point of view, however, a system that unfairly chooses those who will be sentenced to death is a bad thing.

Those who would abolish the death penalty count lives. Scalia counts justice, even if it costs more lives. This should be a quandary for some: should we prefer a system that executes fewer people but executes them arbitrarily or a system that executes more people but distributes the death penalty more widely?

The trouble is, neither approach works. A system that excludes mercy from the punishment equation is not a system of justice, it is a system that merely processes human beings. On the other hand a system that includes mercy inevitably determines who lives and dies in an unfair manner. We don't typically sentence our friends or neighbors to be poisoned to death by lethal injection.[34]

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[31]Walton v. Arizona, 497 U.S. 639, 656-669 (Scalia, J., concurring); see Steven G. Gey, Justice Scalia's Death Penalty, 20 Fla. St. U. L. Rev. 67, 103 (1992).

[32]Mont. Code Ann. § 46-18-303 (2007).

[33]Mont. Code Ann. § 46-18-304; -305 (2007).

[34]"Was it 'home-court advantage'--the fact that the 12 jurors from this small town of Union, South Carolina had known Susan Smith [who had drowned her two children then claimed that they had been kidnaped] or

In the end, therefore, we must conclude that retribution can not justify capital punishment because we kill only strangers. Yet there is more to this question of retribution.

Kant argued that killing the murderer was justified because the murderer makes the lives of all, including the murderer's own life, insecure.[35] *Yet because the state engages in an intentional killing, the state likewise acts to make the lives of its citizens insecure by reason of the power exercised by the state, even if it is exercised through judicial process and only against the guilty. We oppose the power of the murderer because if we do not oppose it, we ratify all citizen's power to kill any citizen throughout society. When we fail to oppose the power of the state to kill, we ratify the state's power to kill any citizen throughout society.*

This explains the challenge I received from law students and other university students in the former Soviet Union each time when, over the course of five years, I taught a class on the U.S. system of justice. They never failed to ask, "How can the United States call itself a democratic country when it still has the death penalty?" They understood, far better than we do, that the state's power to impose death is the power to oppress its citizens. It explains why, when they became independent, one of the first things that they did was abolish the death penalty.[36]

Because execution is final and irrevocable, implementing a death penalty system is an exercise of oppression. Oppression begins with outsiders. The death penalty is a relic of society's exercise of tribal

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had seen her walk the streets of their town, and knew that they had to pass her family on the streets and in the supermarkets of the small town? It was impossible for the prosecutor to show her as a stranger, a monster, or a threat to society." Linda Carter and Ellen Kreitzberg, Understanding Capital Punishment Law 310 (Matthew Bender 2004).

[35]*Kant, fn. 26, above.*

[36]*The former Soviet republics are not alone. After World War II, freed from fascist governments, Italy, Austria, and the Federal Republic of Germany abolished the death penalty.*

defense against The Other–the stranger who would dominate and enslave us. We no longer need to kill the criminal to free ourselves from his power. Retribution therefore fails as a justification for capital punishment.

Deterrence: The Argument for Utility.

Deterrence is the other prevailing justification for capital punishment. Today the argument rages over whether econometric and other statistical studies demonstrate that the death penalty reduces the murder rate, has no effect, or increases the murder rate. I will summarize these findings for you later. First, let us assume that recent studies indeed show a correlation between the death penalty and reduced murder rates but let us ask whether this would justify the death penalty.

Like other aspects of criminal law, deterrence has a religious background:

> *"First, the moral law has a civil use to restrain persons from sinful conduct by threat of divine punishment. '[T]he law is like a halter, [John] Calvin wrote, 'to check the raging and otherwise limitlessly ranging lusts of the flesh. . . . Hindered by fright or shame, [persons] dare neither execute what they have conceived in their minds, nor openly breathe forth the rage of their lust.' The law thus imposes upon saints and sinners alike what Calvin called a 'constrained and forced righteousness' or what Melanchthon called 'an external or public morality.'"*[37]

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[37]*Witte and Arthur, The Three Uses of the Law, 10 J. Law and Religion 433, 436-437 (1994) (quoting John Calvin, Institutes of the Christian Religion (1559) (Ford Lewis Battles, trans, John T. McNeill, ed, Westminster Press, 1960), bk 2, ch. 7.10, bk 4, chap 20.3.; John Calvin, Commentarius in Exodi cap. XX (Final Section on Finis et Usus Legis), in Ioannis Calvini opera quae supersunt omnia (G. Baum, E. Cunitz, E. Ruess, eds, C.A. Schwetschke et Filium 1863-1900), at vol 52, 255.; Philip Melanchthon, Loci communes theologici recens collecti recogniti a Philippo Melancthone (1535), reprinted in G. Bretschneider et al, eds, Corpus Reformatorum (C.A. Schwetschke et Filium, 1834-1860), at vol 1: 706-708.)*

Thomas Aquinas argued that it is permissible to kill the sinful, as a protection to the community.[38] Aquinas likened the criminal to a gangrenous limb–it is necessary to amputate the limb in order to save the body. In the same way it may be necessary to kill the criminal to save society. As a Catholic philosopher, Aquinas was still faced with the additional problem of the criminal's humanity. He answered it with a sleight of hand: the criminal by his offense has joined the race of beasts, that is they had become outsiders, whom it is permissible to kill.[39]

As a moral and ethical question we must recognize deterrence for what it is–a variety of euthanasia. A limb has no existence apart from the body and no purpose other than as part of the body. The body may exist without the limb. The analogy of the body to the community raises the community above the individual. It reduces the individual to a limb that has no purpose and no existence other than as a part of the community. It is immoral, unethical, and undemocratic to reduce an individual to the service of the state. Yet when we execute a human being to discourage others from committing crime, we take on that very power.

When we consider the econometric studies that suggest a deterrent effect, we see how the individual is reduced to a servant of society. Several recent econometric studies, if valid, suggest that the death penalty deters murder.[40] Their conclusions, however, rest on a key pre-condition:

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[38]Thomas Aquinas, Summa Theologica, II-II, Q 64. Art. 2.

[39]Summa Theologica, II-II, Q 64. Art. 2. Again it is a mark of the quality and thoughtfulness of the debate over SB 306 that Rep. Tom McGillivray's objections to the bill mirrored Aquinas's views: "I will suggest that our society needs to purge our society of those types of individuals. They have no regard for human life. They have no regard for the sanctity of life." Remarks of Rep. McGillivray, SB 306, House Judiciary Committee Executive Session, (March 12, 2007).

[40]Joanna M. Shepherd, Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States, 104 Mich. L. Rev. 203 (2005) [hereinafter Shepherd, Deterrence Versus Brutalization]; Joanna M. Shepherd, Murders of Passion, Execution Delays, and the Deterrence of

a deterrent effect is seen only if a state executed between six and eleven (or more) defendants during a 20-year period (1977-1997).[41]

If it is necessary to kill a minimum number of prisoners to achieve deterrence, then Montana must enlarge the pool of death eligible prisoners. This means that we would increase the likelihood of executing one who is innocent. It means that we will execute people who previously, because of the circumstance of their crime or their personal circumstances or other mitigating factors, we did not consider eligible for the death penalty. In other words, we will use scapegoats. We say to the guy, "Normally we would not execute you, but now we will execute you, as Napoleon once said, 'pour l'encourager les autres.'" Thus, we execute under a deterrence theory not because it is just but because it is useful. Deterrence is in fact the state's means of imposing discipline upon a population by killing a certain number of its members. We could roll dice at the time of sentencing and achieve the same effect.

If we rely on deterrence as moral justification for the death penalty, then the econometric and economic studies yield important moral and ethical conclusions. For example, if offenders are engaging in cost-benefit analyses, then we must account for the fact that only some homicides are death eligible. If we want to deter all homicides, then we must make all murders death eligible.

Shepherd theorizes that you must kill a certain number of prisoners to communicate that the risk of execution is real. If we want to increase the deterrent effect then executions should be public. What better way to communicate the risk. When you think about it, public executions are

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Capital Punishment, 33 J. Legal Stud. 283, 308 (2004); Hashem Dezhbakhsh & Joanna M. Shepherd, The Deterrent Effect of Capital Punishment: Evidence from a "Judicial Experiment," at tbls.3-4 (Am. Law & Economics Ass'n Working Paper No. 18, 2004), available at http://law.bepress.com/cgi/viewcontent.cgi?article=1017&context=alea.

[41] *Their findings, however, are flawed. In an equal number of states that did execute more than six defendants during this period, murder rates were unchanged or they increased.* *See pages 22-24, below.*

morally required because, to achieve the same reduction in murder rates, we could execute fewer prisoners in public than we now do in private. Finally, the legislature will be called upon, as a choice of policy, to adjust the level of executions to achieve an optimum level of deterrence.[42]

If euthanasia is unacceptable, the death penalty must be unacceptable. The idea that a person may be killed to benefit society devalues human life. It is wrong to kill the old to make room for the young. It is wrong to kill the weak to make room for the strong. It is wrong to kill the criminal to make room for those who claim to be without fault. In a euthanasia system, society determines the value of human life within its boundaries, compares it to other values that it deems more important, and declares that euthanasia and physician-assisted-suicide are lawful.

The same is true with the death penalty. When we take the life of the wrongdoer to deter murder, we devalue human life. We devalue the life of the offender in an equation that correlates the value of his life to the possibility that another may be saved by his death. Remember, if the Shepherd studies are correct, and if we execute only the guilty and never the innocent, even then, in order to achieve the necessary level of executions to achieve effective deterrence, we must choose a guilty person whose homicide is of a lesser degree of severity. We ignore Christ's commands and the lessons of his parables regarding the value of all human beings and all human dignity.

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[42]*Executions "are intended to draw spectators; if they do not, they don't answer their purpose." 2 Boswell's Life and Letters of Samuel Johnson 447 (1906); "[A] victim of violence can be secured from that of others, not merely by any form of punishment, but by one that is open and public, and serves as example and warning. That is the reason why executions are usually held not in secluded corners of prisons but in the most frequented places, and with terrifying features [which] may be able to strike fear in the hearts of the common sort." Samuel von Pufendorf, The Law of Nature and Nations (1688) (W.A. Oldfather, ed, 1964), at bk 8, chap 3.11.*

Deterrence: If the Studies Are Accurate, Does the State Have a Moral Duty to Impose and Carry Out the Death Penalty?

Cass Sunstein and Adrian Vermeule are both opponents of the death penalty. Nevertheless they have argued that if the Shepherd studies are accurate, the State would have a moral duty to adopt, impose, and carry out the death penalty.[43] *Boiled down to its essence, their argument is: If the state determined that adoption of a particular rule, regulation, or law would save lives (reducing a speed limit, for example, or regulating a toxic chemical), would we not agree that the state would be morally blameworthy for failing to adopt the regulation? If the state is morally blameworthy for failing to act, they argue, then is the state not morally obligated to act? They also point out that the state regularly engages in risk-risk trade-offs. (Banning DDT, for example, had both benefits and costs for society.) They argue that the life-life trade-off that the death penalty represents is no different. If the state may reduce the murder rate by taking the lives of a certain number of killers, it may be morally obligated to do so.*

Sunstein and Vermeule adopt Shepherd's estimate of eighteen lives saved per execution.[44] *That is, one execution correlates to a reduction in the murder rate by eighteen potential victims, give or take ten (±10). The deterrence question then takes on a different human rights and moral perspective. Instead of speaking about the inherent human dignity of the prisoner and our moral authority to take his life, we must now think about*

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[43]*Cass Sunstein and Adrian Vermeule, Is Capital Punishment Morally Required? Acts, Omissions, and Life-life Tradeoffs, 58 Stan. L. Rev. 703 (2006).*

[44]*Sunstein, Vermeule and Shepherd recognize that this number is somewhat artificial. Is Capital Punishment Morally Required?, 58 Stan. L. Rev. at 745; Deterrence Versus Brutalization, 104 Mich. L. Rev. at 207 (recognizing that a threshold of nine executions during a twenty year period is necessary before you observe a correlation between execution and a reduced murder rate, that executing fewer has no effect or appears to increase the number of murders, and that the absence of a death penalty seems to have no particular effect.)*

the 8-28 human beings who will not be murdered. We must consider their inherent human dignity. We must consider our moral duty to engage in defense of others. A closer examination of Sunstein and Vermeule's work reveals the difficulty in weighing those moral questions.

In my view "Is Capital Punishment Morally Required?" suffers from fundamental flaws. The first flaw is the authors' failure to recognize the difference between causation and correlation. If we assume that Shepherd's studies are accurate, the only conclusion that we may draw is that there is a correlation between a certain number of executions in a state and a reduction in the murder rate. From that correlation we may hypothesize that executing a certain number of prisoners deters others from committing murder. In short, we observe the correlation but hypothesize the cause. In order to observe the cause, however, we must conduct more experiments. Therein is our moral dilemma.

Once we reduce Sunstein and Vermeule's argument to a statistical, utilitarian argument, we propose an experiment. We test the hypothesis that executions cause fewer murders only by killing more convicted murderers and observing the social effect. In an ever-changing society every additional execution would be an experiment. In other words, if we kill 500 prisoners this year and see a beneficial deterrent effect, this does not necessarily mean that we will see the same deterrent effect for the same number of executions in following years. And if we do not see the effect in the years following, what do we say? "Oops?"

At the empirical level, we would have to confirm the hypothesis from year to year in order to avoid the moral culpability of executing people who we did not need to execute in order to save lives. But we are then caught in another conundrum. In order to confirm the hypothesis from year to year, we have to conduct the experiment each year. In order to conduct the experiment each year, we must intentionally kill a statistically meaningful number of convicted murderers each year. When we kill that number and the hypothesis of saved lives is not confirmed, what is our moral culpability?

Their second flaw is that in assigning moral duty to the state, Sunstein and Vermeule ignore will. They argue that we are morally

culpable when we fail to apply the remedy that reduces loss of life. Sunstein's and Vermeule's application of Shepherd's statistical arguments claim to "measure" the exercise of free will. When a murderer exercises free will to engage in murder in a system that does not have capital punishment, is my will carried out? It is my will that he not murder, and my will is reflected in the definition of the crime of murder and the measure of its punishment. Therefore, when the criminal wills death, he goes against my will. Only if it is my will to legitimize murder by decriminalizing it or by not sanctioning it severely so that murder is tacitly legitimized, only then is it my will that he may murder. But that line is not drawn by capital punishment. So long as it is my will to punish murder severely with a long sentence of imprisonment, I do not will that he commit murder. It cannot be argued that I will 18 additional deaths if I oppose capital punishment, because I do not. Otherwise it would have to be argued that we all will between 15,000 and 24,000 deaths,[45] because we do not execute every person who commits a homicide.

Finally, we must recognize that the risk of being killed by another, whether through pure accident, the other's negligence, or the other's intent, is a risk of living in society. Deterrence simply is a means to reducing a part of that risk. Killing the prisoner is a means of reducing the risk. But, is it the only means? That is, in the pantheon of choices (killing the prisoner, hiring more police, training police better, encouraging and training people in self-defense, among others) is killing the prisoner the moral means? If we spend money and achieve these other means, what will it do to Shepherd's estimates?

So, you see that we have a moral duty to define murder as a crime and to punish it severely. We do not, however, have a moral duty to execute one murderer, eighteen murderers, or every person who commits a homicide.

***Deterrence: The Argument for Accuracy**.*

When we consider the studies and arguments about deterrence, we

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[45]*Fed. Bureau of Investigation, Crime in the United States tbl.1 (2003), available at http://www.fbi.gov/ucr/03cius.htm (for death rates.)*

often ask the wrong question, which is does the death penalty deter or not? The correct question is, does the death penalty deter murders or does it result in more murders? The studies should demonstrate that the death penalty either increases the murder rate or decreases the murder rate. If these studies fail to prove that capital punishment causes fewer murders of if a consensus on this issue is not reached, then there is a failure of proof and deterrence can not justify the death penalty.

There is a second false dichotomy: nearly all studies compare the death penalty or execution rates with the lack of the death penalty or lack of executions. In other words, their dichotomy is between sentences that range from 0 years to life in prison and the sentence of death. They fail to compare execution to a sentence of life in prison without possibility of parole.

Then there is the third problem of the anti-deterrent effect. If we execute that number of prisoners necessary to deter homicides, then the homicide rate during a period that follows should decline. If the homicide rate declines, then, too, the number of executions will decline because there have been fewer homicides. If the number of executions decline and we fall below the deterrent threshold, then the homicide rate rises. In order to achieve a lasting deterrent effect, the likelihood of execution must be perceived to be constant over the long term. That means, again, we have to execute more people, people who otherwise did not deserve execution.

As to deterrence's failure as a justification, consider this. Deterrence is scapegoatism. We offer up a scapegoat, most of the time guilty, sometimes not, in order to communicate to other would-be-murderers that the consequences of their crime are great. The trouble with this approach is that we have built in procedures and rules to ensure against the conviction of the innocent, to ensure against the conviction of a more serious crime of those who are guilty of a less serious crime, and to ensure that the process is fair. In other words, in our so-called deterrent system, at the outset we communicate to the criminal that we have a system designed to get you off. It becomes impossible then to have a justice system that protects the innocent at the same time it deters the guilty.

The Controversy About Empirical Evidence of Deterrence.

"[E]mpirical studies have never been able to establish what deterrent effects, if any, flow from capital sentencing."[46]

The two key writers who find a correlation between the death penalty and deterrence are Joanna Shepherd, who I mentioned earlier, and Isaac Ehrlich.[47]

Shepherd engaged in a complicated attempt to isolate every factor that might influence murder rates in a state. She then attempted to control for every factor except the presence of a death penalty and the occurrence of executions. Even then, Shepherd noted:

> *"The results are striking. Consider the twenty-seven states where at least one execution occurred during the sample period. Executions deter murder in only six states. Capital punishment, however, actually increases murder in thirteen*

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[46]*Comment, B. Douglas Robbins, Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted upon the Occasion of an Authentic Ethical Transformation, 149 U. Pa. L. Rev. 1115, 1130 & n.83 (2001). Don't forget one omission in the deterrence studies: We use imprisonment for most murders and the death penalty only for the "worst" murders. (The definitions of "worst" murders differ from state to state.) Statistical analyses that address the death penalty's effect on murder rates should not robustly reflect the effect of the death penalty because most murders are punishable by imprisonment. An accurate analysis would limit itself to the "worst" murders, those that are death eligible under state law. No one has performed that analysis.*

[47]*Isaac Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 Am. Econ. Rev. 397 (1975) (hereinafter Ehrlich, Deterrent Effect); Isaac Ehrlich, Deterrence: Evidence and Inference, 85 Yale L.J. 209 (1975); Isaac Ehrlich, Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence, 85 J. Pol. Econ. 741 (1977); Isaac Ehrlich, Of Positive Methodology, Ethics, and Polemics in Deterrence Research, 22 Brit. J. Criminology 123 (1982).*

states, more than twice as many as experience deterrence. In eight states, capital punishment has no effect on the murder rate. That is, executions have a deterrent effect in only twenty-two percent of states. In contrast, executions induce additional murders in forty-eight percent of states. In seventy-eight percent of states, executions do not deter murder."[48]

Her results for Montana suggest that our use of the death penalty has resulted in more, not fewer homicides. Using six different test models, she found that each execution "caused" 30.62, 1.24, 24.08, 14.64, 3.40, or 16.28 new murders. Note, however, that Shepherd considers only the fourth and sixth figures (14.64 and 16.28) statistically significant.[49] *These results notwithstanding, Shepherd found no evidence of deterrence in Montana.*

Shepherd undertook a difficult task and her work is very interesting. The key criticism of her work has to do with the impact of Texas on her statistical analyses. Texas executed the most prisoners, 107, during 1977-1997, the period that Shepherd studied. Florida, with 38 executions, was second. Shepherd's critics point out that she should have recognized that Texas would skew her results.[50] *A quick analysis shows that this is true.*

Shepherd concluded that only states that executed between 6 and 11 prisoners during 1977-1997 observed a deterrent effect. Therefore she

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[48]*Shepherd, Deterrence v. Brutalization, 104 Mich. L. Rev. at 205.*

[49]*Shepherd, Deterrence v. Brutalization, 104 Mich. L. Rev. at 230, 254.*

[50]*John J. Donohue and Justin Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, IZA Discussion Paper No. 1949 at 29-36; 59 Stanford L. Rev. 791, 814-816 (2006) ("Uses and Abuses"). (Subsequent references will be to the Stanford Law Review); Richard Berk, New Claims About Executions and General Deterrence: Déjà Vu All Over Again?, 2 J. Empirical Legal Stud. 303, 305 (2005).*

concluded that it is necessary for a state to execute a "threshold" number of prisoners (she arbitrarily chose 9 as the threshold) before a deterrent effect would be observed.

Shepherd based her "threshold" execution level on the difference between the average (mean) number of executions in what she termed as the six "deterrent" states (DE, FL, GA, NV, SC, TX) and the mean number of executions in those states that saw no effect or an increase in murders. She felt that this proved up her estimate that between 6 and 11 executions were necessary before a given state saw a deterrent effect.

In fact, without Texas, there is no threshold effect. When we remove the outliers (Texas and those states who executed less than six prisoners) the difference that accounted for Shepherd's threshold effect disappears. When we discard all of the outliers and select only those 14 states who executed 6 or more prisoners (DE, FL, GA, NV, SC, AL, AR, LA, MO, NC, OK, VA, IL, AZ) , we find an entirely different picture. The mean number of executions for "deterrent" states (omitting Texas) is 17. The mean number of executions for non-deterrent states who executed 6 or more prisoners is 15.3.

When she attempted to see why murder rates varied among states, Shepherd made state-level and county-level assumptions about demographics, economics, appropriations for law enforcement, the probability of arrest (for murder), "political conservatism (which was assumed if the majority voted for the Republican presidential candidate)," appropriations for the judiciary, NRA membership (which she assumed reflected gun ownership), and prison admissions, as well as the probability of receiving a death sentence and the probability of the death sentence being carried out.[51] She used as many as fifty such variables.[52]

The trouble is, Shepherd's assumptions can run in the opposite direction. If a state applies the death penalty vigorously, what else is going

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[51] *Shepherd, Deterrence v. Brutalization, 104 Mich. L. Rev. at 224-225.*

[52] *Shepherd, Deterrence v. Brutalization, 104 Mich. L. Rev. at 245.*

on in the state? Does such a state enforce all of its criminal laws vigorously and punish their violations severely? If so, would an observed decrease in murders be the result of executions, the general vigorous enforcement of the law, harsher prison conditions, or increased sentences? (After all, more murderers receive prison sentences than receive death sentences.) If gun ownership is a measured variable, as it is in Shepherd's paper, does that mean that murders increase because of the availability of deadly weapons or do they decrease because of the availability of firearms for self-defense? These assumptions may run in the opposite direction.

When you alter some of Shepherd's assumptions by a little bit, you observe large swings in the results. Instead of each execution correlating to a decrease in homicides, a small change in an assumption results in each execution correlating to an increase in homicides, and vice versa.[53] *Here is an analogy. If I zero in my rifle at 100 meters, each time I fire my rifle at 100 meters, it should hit the bullseye, considering only the variables of elevation and windage on my sight and "controlling" for every other variable. If this is correct and we ignore the elevation variable, then the strike of the bullet should be anywhere along the vertical line of the bullseye. If we adjust elevation in a way that should drop the strike of the bullet, we should see that effect. If, instead, the bullet fails to stay in the vertical or it rises instead of drops, that means that some other variable is in play.*

Donohue and Wolfers argue that you must consider and test for all variables--in the rifle analogy, distance from the target, wind speed, air density, for example--without altering or influencing the other variables. This, they point out, is an impossible task.[54] *In my rifle analogy, barometric pressure, wind speed and direction, and relative humidity all affect the path of my bullet. All of these, however, are inter-related, so I cannot control for one without affecting the other. Predicting the social behavior of human*

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[53]*Donohue and Wolfers, Uses and Abuses, 59 Stanford L. Rev. at 798-801.*

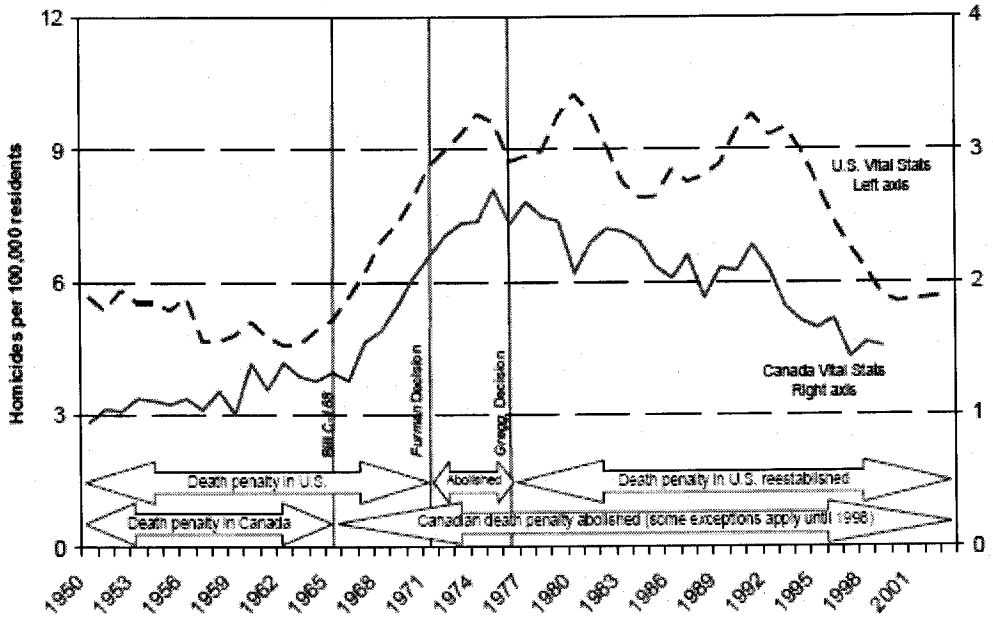
[54]*Donohue and Wolfers, Uses and Abuses, 59 Stanford L. Rev. at 844 n. 119.*

beings is much, much more complicated than predicting the physical behavior of my rifle. If you cannot identify and control for all variables, you cannot make reliable predictions.

Donohue and Wolfers argue that the better approach is an epidemiological study. That is, if homicide is the disease and the death penalty the medication, we would need to know if the "patient" was getting better because of administration of the death penalty or whether the patient was simply getting well for other reasons. In order to accurately measure whether the execution rate influences the homicide rate, it is necessary to have a placebo or control group–jurisdictions where the same variables, except the death penalty, are in effect. If the death penalty drives changes in homicide rates, then we should see a significant difference between the death penalty jurisdiction and the death penalty free jurisdiction. Shepherd and her co-authors did not employ a control group. Donohue and Wolfers employed two.

Donohue and Wolfers, employing Shepherd's methods, did a control group comparison for Canada and the United States. First, they compared the homicide rates in Canada and the United States. Canada had limited the death penalty to one kind of murder in 1967 and had not executed a prisoner since 1962. Nevertheless, Canada's homicide rate tracked the United States' throughout 1950-2004.

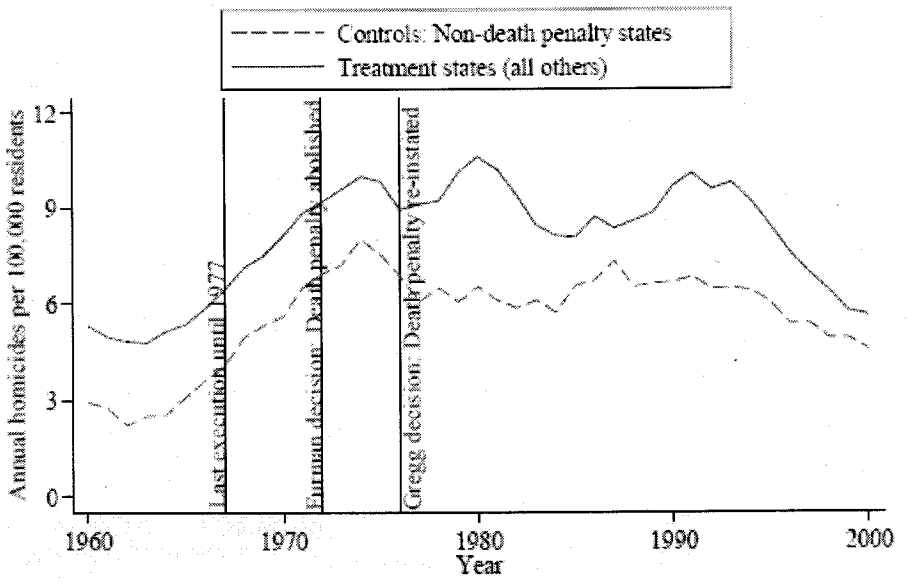
Figure 2. Homicide Rates and the Death Penalty in the United States and Canada



Donohue and Wolfers, Uses and Abuses, 58 Stanford Law Review at 799.

Donohue and Wolfers did a second control group comparison between non-death penalty states and Shepherd's "deterrence" states and found the same result, which is set forth in Figure 3, on the next page. The homicide rates in death penalty states and non-death penalty states went up and down at the same time.

Figure 3. Homicide Rates in the United States



Non-death penalty states are those without a death penalty throughout 1960-2000: AK HI ME MI MN WI

Donohue and Wolfers, Uses and Abuses, 58 Stanford Law Review at 801.

Therefore, we should honor Shepherd's warning at the end of her paper: "[T]he results cannot yet offer definitive conclusions about the degree to which capital punishment deters or induces murders in a specific

state."[55]

More important, we should honor Donohue and Wolfers's results. The massive swings when assumptions are altered, the lack of statistical confidence in the results, and the faulty underlying assumptions in studies that find deterrent effects mean that these econometric studies are poor foundations on which to base public policy.

Ehrlich's work was more primitive. Ehrlich treated murder as a supply-demand econometric model, where murder was the supply and the commission of murder was the demand. In measuring the impacts of criminal justice policy on the demand side, he considered the probabilities of arrest for murder, the probability of an arrested person being charged, the probability of the charged person being convicted and the probability of a convicted person being executed. Immediately, a flaw in Ehrlich's estimates and assumptions appears. He is interested in capital murder. There is, however, no statistical base line of what constitutes capital murder. That is, he could not estimate the percentage of murders committed that might be defined as capital murder.[56]

Ehrlich's work triggered a flood of responses that pointed out flaws and inadequacies in his methodology.[57]

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[55]*Shepherd, Deterrence v. Brutalization, 104 Mich. L. Rev. at 248.*

[56]*Question of Life and Death at 408. Ehrlich recognized that he had no statistical base line but assumed that his approach provided a good estimate.*

[57]*William J. Bowers, Legal Homicide: Death as Punishment in America, 1864-1982, at 303-35 (1984); Lawrence R. Klein et al., The Deterrent Effect of Capital Punishment: An Assessment of the Estimates, in National Research Council, Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates 336-60 (Alfred Blumstein et al. eds., 1978); Brian Forst, The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960s, 61 Minn. L. Rev. 743 (1977); Hans Zeisel, The Deterrent Effect of the Death Penalty: Facts v. Faiths, 1976 Sup. Ct. Rev. 317; Deryck Beyleveld, Ehrlich's Analysis of Deterrence, 22*

Donohue and Wolfers pointed out:

> *"Isaac Ehrlich's 1975 American Economic Review paper analyzed U.S. time series data on homicides and execution from 1933-1969, finding that each execution yielded 8 fewer homicides. This result was somewhat puzzling in light of the fact that an 80 percent drop in the execution rate from the late 1930s until 1960 had been accompanied by falling murder rates. A subsequent re-analysis by Peter Passell and John Taylor showed that Ehrlich's estimates were entirely driven by attributing a sharp jump in murders from 1963-69 to the post-1962 drop in executions."*[58]

Finally, the work of Walter S. McManus,[59] *points out how sensitive Ehrlich's data are to the researcher's prior assumptions. He noted that the assumptions made by the researcher about the role some variables drove the final result. This was true whether the researcher found a deterrent effect or found no deterrent effect or found that executions were related to an increased murder rate.*

One economist noted that "Almost every feature of Ehrlich's analysis has been questioned or criticized."[60] *His critics have included a winner of the Nobel prize in economics. It is probably safe to say that no economist,*

Brit. J. Criminology 101 (1982); James A. Fox & Michael L. Radelet, Persistent Flaws in Econometric Studies of the Deterrent Effect on the Death Penalty, 23 Loyola L.A. L. Rev. 29 (1989).

[58]*John J. Donohue and Justin Wolfers, The Death Penalty: No Evidence for Deterrence, Economist's Voice, Vol. 3 : Iss. 5, Art. 3 (2006). Available at: http://www.bepress.com/ev/vol3/ iss5/art3.*

[59]*Walter S. McManus, Estimates of the Deterrent Effect of Capital Punishment: The Importance of the Researcher's Prior Beliefs, 93 Journal of Political Economy 417 (1985).*

[60]*Beyleveld, Ehrlich's Analysis of Deterrence, 22 Brit. J. Criminology at 105.*

save Ehrlich and his co-authors, currently considers Ehrlich's conclusions to be valid.[61]

So the only conclusion that we may draw is that, at best, the jury is still out on the question of whether executing murderers deters murders more effectively than life sentences or life without possibility of parole. Likewise, we still do not know whether executions are related to an increase in the murder rate. Both remain equally plausible hypotheses.

Specific Deterrence.

Even if we reject the idea of general deterrence as a justification for the death penalty, we must consider the idea of specific deterrence. That is, even if we do not deter others from committing murder, by killing a guilty murderer we ensure that he will never murder again. Killing this murderer is therefore an act of self-defense.

For example, who would not justify traveling back in time to the 1930s to ensure that Adolf Hitler was executed for his attempted coup? We forget, however, that if we did so, we would act with limited knowledge. If among those millions that Hitler killed there was one who would kill hundreds of millions in the future, which would be the moral trade-off? When we execute a prisoner on specific deterrence grounds, we are doing little more than tinkering with the future.

In short, we "know" from experience that some criminals will kill in prison and we know that some killers will kill again. What we do not know, however, is who that person is among the greater group of prisoners and among the greater group of murderers. It is very hard to tell. If you had asked me if Rick Worden, convicted of executing three people during a robbery on the High Line, would kill in prison, I would have said yes and I would have been wrong. Worden hasn't killed anyone else and I would be at a loss to explain why he sent my clinic a Christmas card every year or

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[61] *I want to be clear here. That does not mean that Ehrlich's work is not valuable. It has offered some insights and spurred other research into the econometrics of crime. Ehrlich's work does not, however, provide a valid grounding for policy decisions.*

why he expressed to me that he understood and believed that he should never be released from prison.[62]

This is the difficulty with the self-defense aspect of deterrence. Once the prisoner is incapacitated, we may not kill him in self-defense because our knowledge of the future is too imperfect to ensure that we are in fact acting in self-defense.

Three Final Words on Indirect Deterrence.

In the end, we must ask ourselves this question. Were we presented with econometric studies of similar strengths and weaknesses that demonstrated that an expensive government regulation would save lives, would we adopt that regulation? I think that the answer is no. If we can not justify spending money to save lives where the evidence is thin, can we justify spending lives where the evidence is equally thin?

How deterrent is death in Montana? Of the 13 men sentenced to death since 1972, four volunteered to be executed and two committed suicide.

Michael Ross, an inmate at the correctional institute in Somers, Connecticut, spoke from experience when he argued that deterrence has a negligible influence on the mind of a murderer:

> *"What [deterrence theory] assum[es] is that a murderer thinks as rationally as [others] do. .... I have been incarcerated for more than 10 years now and I have yet to meet anyone who expected to be caught and punished for their crimes. Rather,*

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[62]*The impossibility of such prediction shows up in another study. G.I. Giardini & R.G. Farrow gathered statistics from 22 states where prisoners, initially sentenced to death, had their sentences commuted and were later paroled. Of 197 capital cases, 11 re-offended, 7 violated parole rules, 5 absconded, 11 died, 129 remained on parole, and 34 completed parole. Only two committed a new homicide. G.I. Giardini & R.G. Farrow, The Paroling of Capital Offenders, in Capital Punishment, 169-188, Thorsten Sellin, Ed. (Harper & Row 1967).*

they expect to get away with it because of good planning. There can be no deterrent value in a punishment that one does not ever expect to receive.

A second type of murder is equally unlikely to be deterred by capital punishment: the spontaneous, emotionally driven murder. Such a murderer doesn't...coolly consider the foreseeable consequences of their actions.... Fear of death, in itself, will not prevent this type of crime."[63]

IV. The Remaining Question: Execution of the Innocent.

Supporters of the death penalty claim that no one has ever proven that we have executed an innocent person. This is a very disingenuous argument. Once an execution has taken place, the state closes the book on that case. The evidence is thrown away. The file is eventually shredded. Even where the file and the evidence remain, the state has always successfully opposed any attempt to re-open the case. If I put a cat in a box and claim that the cat is dead and you claim it is alive, do I have the stronger argument if I refuse to open the box?

We do know several things, however. First, we know that eyewitness identification is terribly flawed. When forensic DNA testing came on the scene in the 1980s and 1990s, the FBI lab conducted DNA testing for local law enforcement agencies. So that the FBI lab would not be swamped with requests, it told those agencies to send DNA evidence only in those cases in which they had a prime suspect–that is, where the suspect had been identified by one or more eyewitnesses. The FBI was stunned to learn that DNA testing failed to confirm and often excluded the prime suspect–the guy who had been identified–in 25% of the cases. In 2000, Louis Freeh, the FBI Director, spoke at the Law School. I asked him about this and asked if the rate had changed. He confirmed that the rate had changed. It was now about 30%. Victims are stunned to learn this.

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[63]*Michael Ross, Criminals Are Not Deterred by the Death Penalty, in Does Capital Punishment Deter Crime? 39, 41 (Stephen E. Schonebaum ed., 1998).*

Second we know that 130 men on death row have been exonerated since 1973. Some were hours from execution. That extraordinary number commands an inference: before DNA and other forensic testing was available to exonerate such men, we must have executed them.

The availability of DNA testing does not change the likelihood that we will execute innocent defendants. There are two reasons for this. First, DNA is not available in all cases. We will continue to sentence people to death on the basis of flawed eyewitness testimony.

Second, even when DNA evidence is available, it will be misused or misunderstood. In the last year I have seen two such cases. In the first, the prosecution offered DNA evidence that was so common it encompassed perhaps one-third to one-half of the male population, including the defendant in the case. They did not tell the jury this. Instead the prosecutor elicited testimony that only the defendant could be the source of the DNA and that the DNA evidence proved with a certainty that the defendant had committed the murder. In the second case, an accusation of an oral sexual assault of a child, the state found saliva on the child's underwear. DNA testing of the stain revealed the DNA patterns of the child and of an unknown person. That person, however, was not the defendant. The prosecutor elicited testimony that suggested the unknown DNA may have been caused by fecal matter. They failed to tell the jury that fecal matter would not contribute to the DNA pattern unless the child was a cannibal. (Forensic DNA testing obtains results only for primate (human, ape, and monkey) DNA.) The defendant, even though the DNA result positively excluded him, was convicted on the basis of eyewitness identification.

I should point out that in both of the cases that I have mentioned, the defense attorneys were refused funds or refused sufficient funds to pay for someone to assist them in understanding the DNA results and explaining the DNA results to the jury.

V. Conclusion

The State has no "right" to execute a convicted murderer. The State has only the powers given to it by its citizens. That is, I and fellow citizens

give up certain rights in order to live in a safer, healthier, richer society. But when it comes to a response to crime, my right is neither a right of retribution nor of vengeance. Where would such a right come from but from the society of beasts? My rights are only those of safety and of self defense. My right of self-defense is a right not to kill but to use deadly force, at most. Even then, my right of self defense does not extend to an incapacitated criminal. If that is the limit of my right, then what power do I give to the State? Not a power to kill me. No, the power of a state to execute its citizens is a vestige of autocratic and despotic regimes. As my Kyrgyz and Georgian students asked, how can we call ourselves a democratic society if we continue to kill our citizens?

What it comes down to then is the conclusion that the death penalty that is imposed in a system that provides due process will often be applied arbitrarily, not fairly. This is not a question of "evolving standards of human decency" but of knowledge and capabilities of studying and understanding the criminal justice system that were not available or not employed in the late 18th Century. The fact that the authors of the Constitution and of the Bill of Rights considered death to be a permissible punishment does not change the fact that they considered cruel and unusual punishments of any kind to be impermissible punishments. The prosecutor's decision to seek or not to seek death is driven by many factors not related to the nature of the offense. Costs, the nature of the victim, the nature of the offender, the political ambitions of the prosecutor, the politics or personal beliefs of the prosecutor, all infect the decision. The decision is not made merely on the basis of the evidence and justice. When a prosecutor has absolute discretion to seek or not to seek the death penalty his decision is not necessarily our decision. When a jury or a judge has absolute discretion to grant mercy, their decision is not necessarily our decision. The prosecutor's decision and the jury or judge's decision are human decisions, sometimes warranted by justice and sometimes not. When a defendant is imprisoned, we may correct those decisions that are warranted by justice. When a defendant is executed, there is no bringing him back.

In the end, however, it comes down to our own morality. The prisoner, if he is guilty, has already acted. It is left to him, then, to repent and atone for his act. We, on the other hand, stand at the cusp of the

moral or immoral action when we make the call about punishment.

When we execute someone, we deny him human dignity in the process, and we deny him the opportunity for repentance and redemption in the process. We therefore act as only God may act. We commit the sin for which God cast Lucifer from Heaven and Adam and Eve from the Garden. It is not the Fifth Commandment that we violate when we impose the death penalty. We violate the First.

Sincerely,

Jeffrey T. Renz
Clinical Professor of Law